No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

PATRICIA DIANE SMITH SLEDGE,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the Ninth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Did the district court prejudicially err when admitting Exhibit 1 as a summary pursuant to Fed Rules of Evidence, rule 1006?

Was the evidence sufficient to support the witness tampering convictions?

Parties to the Proceeding

The parties to the proceedings in the Ninth Circuit Court of Appeal were the United States of America and petitioner Patricia Diane Smith Sledge. There were no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Patricia Diane Smith Sledge, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeal filed on March 11, 2019.

Opinions and Orders Below

The original opinion of the Ninth Circuit Court of Appeal affirming petitioner's conviction is attached hereto as Appendix A.

Jurisdiction

The decision of the Ninth Circuit Court of Appeal sought to be reviewed was filed on March 11, 2019. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 131.1. This Court has jurisdiction to review under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law ...."

B. Federal Statutory Provisions

Federal Rules of Evidence, rule 1006 states in pertinent part that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."

Statement of the Case

Petitioner was convicted of mail fraud, in violation of 18 U.S.C. § 1341, witness tampering, in violation of 18 U.S.C. § 1512, subdivision (b)(3), and committing an offense while on release pending trial, in violation of 18 U.S.C. § 3147, subdivision (1). (see Appendix A.)

On appeal, petitioner contended that the district court prejudicially erred in admitting Exhibit 1 as a summary pursuant to Rule 1006. This error was exacerbated by the improper manner in which the prosecution argued the exhibit to the jury. Petitioner suffered further prejudice when this exhibit was used to both enhance her sentence and calculate the amount of restitution owed. She further argued the evidence was insufficient to support the convictions for witness tampering. (U.S. Const., Amends. VI, XIV). (Appendix A pp. 2-9.)

The Ninth Circuit Court of Appeal disagreed and affirmed the conviction, contradicting this Court's precedent and decision from most other circuits. (Appendix A.)

Reasons for Granting the Writ

This Court Should Allow The Writ In Order To Decide An Important Question Of Law And To Resolve The Conflict In The Federal Circuit Courts of Appeals On This Issue.

A. Exhibit 1 did not qualify as a summary pursuant to Rule 1006.

Federal Rules of Evidence 1006 provides, in pertinent part, "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." "To comply with this Rule, therefore, a chart summarizing evidence must be an *accurate* compilation of the voluminous records sought to be summarized. Moreover, the records summarized must otherwise be admissible in evidence." *United States v. Janati*, 374 F.3d 263, 272 (4th Cir.2004) (internal citations omitted). Thus, summary exhibits under Rule 1006 function "as a surrogate for voluminous writings that are otherwise admissible." *Id.* at 273.

Significant to this case, absent a stipulation that an exhibit accurately summarizes voluminous writings, such Rule 1006

summaries do not come into evidence of their own accord; a witness or other foundation is required. *See State Office Sys., Inc. v. Olivetti Corp. of Am.* , 762 F.2d 843, 845 (10th Cir.1985) (noting that testimony by plaintiff's president explaining that the figures in the summary came from business records and stating that he helped prepare the summary was sufficient to satisfy "the foundational requirement"); *United States v. Bray* , 139 F.3d 1104, 1110 (6th Cir.1998) ("In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.").

Finally, in order to be admissible under Rule 1006, a summary document must be generally accurate and not unfairly prejudicial. *E.g., Janati*, 374 F.3d at 273. In other words, it cannot be presented in a misleading manner or be "embellished by or annotated with the conclusions of or inferences drawn by the proponent." *Bray*, 139 F.3d at 1110 ; *see also United States v. Porter*, 821 F.2d 968, 975 (4th Cir.1987) (noting that "[s]ummary charts may be admitted if they are based upon and fairly represent competent evidence already before the jury"). Yet, in this case, despite the challenged document's misleading

characterization of policies generated by petitioner and its clear lack of foundation as a summary of *fraudulent* polices, the Ninth Circuit erroneously found the district court properly admitted Exhibit 1. (Appendix A.)

"The purpose of Rule 1006 is to allow the use of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible[.]" *United States v. Johnson,* 594 F.2d 1253, 1255 (9th Cir. 1979). However, at issue here is the government's failure to show "that the summation accurately summarizes the materials involved by not referring to information not contained in the original." *Pritchard v. Liggett & Myers Tobacco Co.,* 295 F.2d 292, 301 (3d Cir. 1961) (citing *Standard Oil Co. of Cal. v. Moore,* 251 F.2d 188, 222-23 (9th Cir. 1957) (finding that although the summary contained information drawn from the underlying ledger, it also contained computations which were not reflections of the ledger entries)); *see also Holland v. United States,* 348 U.S. 121, 128 (1954) (admonition to guard against situations in which figures, computations, and charts acquire "an existence of their own, independent of the

evidence which gave rise to them.") Specifically, in this case the prosecution used the challenged summary as a summary of fraudulent insurance policies attributed to petitioner. Yet, the only witness to testify as to the accuracy of this summary could not identify any of the policies it contained as fraudulent.

Here, the government failed to lay the proper foundation for and establish the overall admissibility of the evidence underlying the "summary" that is Exhibit 1, a "condition precedent to introduction of the summary into evidence under Rule 1006." 594 F.2d at p. 1257. This condition exists since otherwise Rule 1006 would tend to become a vehicle for the avoidance of all other evidentiary limitations. "Thus the same general foundation must be laid as if the underlying materials were actually being offered in evidence, minus of course the sort of item by item in-court identification which ordinarily attends that process." *Needham v. White Laboratories, Inc.* F.2d 394, 403 (7th Cir. 1981).

As discussed above, because the government failed to present evidence establishing all of the claims contained in the spreadsheet that

is Exhibit 1 were in fact fraudulent, it failed to meet the necessary condition precedent that the information in that exhibit was in fact admissible. Rather, the trial court erroneously admitted the spreadsheet pursuant to Rule 1006 despite the fact that the government failed to lay the proper foundation for its contents. As most courts agree, Rule 1006 was not drafted with the intent to permit the proponent of the evidence to "abrogate other restrictions on admissibility" such as foundation, relevance or the hearsay. See 594 F.2d at 1256; see also *United States v. Goss,* 650 F.2d 1336, 1344 n. 5 (5th Cir. Unit A 1981) (that Rule 1006 does not permit "the admission of summaries of the testimony of out-of-court witnesses" because such testimony would be hearsay); *United States v. Francis,* 131 F.3d 1452, 1457-58 (11th Cir. 1997) (rejecting challenge to admission of Rule 1006 summaries of intercepted phone calls, in part because underlying calls and transcripts were admitted into evidence); *United States v. Norton,* 867 F.2d 1354 1363 (11th Cir. 1989) (assumptions in Rule 1006 exhibit must be " 'supported by evidence in the record' "); *United States v. Atchley,* 699 F.2d 1055, 1058-59 (11th Cir. 1983) (affirming admission, under Rule

1006, of chart reflecting telephone toll records which had themselves been introduced under Rule 803(6)). Yet, that is exactly what occurred here.

In this case, the only witness to the challenged exhibit's preparation, Gonzalez, could not testify to the fraudulent nature of the claims represented in the summary exhibit. She did not investigate the claims. The government failed to present any additional evidence establishing that each and every claim represented in the spreadsheet was in fact fraudulent. The government, the proponents of this summary, failed to present evidence establishing the admissibility of the documents upon which Exhibit 1 was formulated. They failed to establish that each and every payment made by AFLAC, as represented in the spreadsheet, was paid because of petitioner's fraudulent conduct. As a result, the spreadsheet was not a "summary" of fraudulent claims attributed to petitioner. Its admission as such a summary was in error and petitioner suffered prejudice as a result, specifically a grossly inflated sentence.

For instance, the manner in which the inadmissible summary was

used by the prosecution and the district court was inherently prejudicial. Thus, the Ninth Circuit erred when finding the district court properly admitted this summary because of the prejudicial nature of its alleged contents and because of the improper manner in which the prosecution argued its contents. Moreover, the prejudicial error resulted in an unwarranted increase in petitioner's sentence and an unfounded amount of restitution. In order to be properly admitted under rule 1006, a summary document "must be accurate and nonprejudicial." *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986). "This means first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a non-misleading manner. Nothing should be lost in the translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise." 139 F.3d at 1110. Yet, in this case, the prosecution did just that. Here, the prosecution

embellished the summary by claiming it was an accurate depiction of fraudulent claims. "Once a Rule 1006 summary is admitted, it may go to the jury room, like any other exhibit. Thus, a summary containing elements of argumentation could very well be the functional equivalent of a mini-summation by the chart's proponent every time the jurors look at it during their deliberations, particularly when the jurors cannot also review the underlying documents." *Ibid.* That is exactly what occurred here.

In commenting on the alleged fraudulent scheme, the prosecutor argued that Exhibit 1 summarizes "each of the entities that were identified and the total amount of claim that was paid out by Aflac for those entities." ER Vol. 8, pg. 1462. The prosecutor used this chart to support its claim that petitioner engaged in a pattern of criminal conduct. The prosecutor continued, advising the jury that they "heard testimony that [the total loss] was $3.9 million." ER Vol. 8, pg. 1462. Yet, the prosecutor even admitted he failed to present evidence regarding each of the claims listed in the spreadsheet, advising the jury "[t]here's a lot of companies listed in the first column here of Exhibit

1. We didn't take you through all of them. We would be here for months if we did." ER Vol. 8, pg. 1462. Hence, rather than actually prove the truth of the information in Exhibit 1, the very information the prosecutor was now asking the jury to accept as true and use to convict petitioner, the prosecutor asked the jury to assume it was all true and correct because it had presented evidence that *some* of the claims paid out were in fact fraudulent. However, it was improper for the prosecutor to argue that each and every claim represented in Exhibit 1 was fraudulent when he failed to present evidence to suggest so. Now, the prosecution was claiming petitioner engaged in a complex fraud scheme based on the entirety of the spreadsheet in Exhibit 1, a spreadsheet wrought with facts the prosecution admitted they never discussed nor established during the trial. The prosecution asked the jury to accept as true this evidence that they admittedly failed to present at trial as proof petitioner's alleged "pattern of fraud," arguing the spreadsheet explained what petitioner's "fraud scheme looked like." ER Vol. 8, pg. 1462.

Again, there was absolutely no evidence presented at this trial

establishing the actual total amount of loss suffered by AFLAC. Certainly, there was no evidence presented to suggest that every claim represented in Exhibit 1 was the result of fraud. Hence, the error in admitting Exhibit 1 was prejudicial because it permitted the prosecution to improperly argue the amount of loss to the jury. This Court has found conduct such as this is grounds for reversal. *See Berger v. United States*, 295 U.S. 78, 85 (1935) (reversing conviction where prosecutor claimed, without evidence in record, that particular witness knew defendant because statement contained "improper insinuations and assertions calculated to mislead the jury"); *see also Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (defendant "is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds . . . not adduced as proof at trial"); *United States v. Schindler*, 614 F.2d 227, 228 (9th Cir. 1980) (prosecutor may not seek to obtain conviction by going beyond admissible evidence).

The error continued during the sentencing hearing, exacerbating the prejudice suffered from the improperly admitted exhibit. At the sentencing, the prosecutor repeated the argument regarding the amount

of loss attributed to fraud and asked for a sentence level enhancement based on this unproven amount of loss in Exhibit 1. In its sentencing position, the government claimed that "[a]s a result of defendant's scheme, AFLAC paid a total of $4,073,640.84 in claims based on fraudulently obtained policies." ER Vol. 1, pgs. 101-108. The government further argued that, due in part to this amount of loss, "the applicable guideline range in this case is 188 to 235 months." ER Vol. 1, pgs. 101-108. However, as discussed repeatedly, the government failed to present sufficient evidence to prove this total amount of loss. Yet, the district court accepted this argument and accepted this amount of loss as true and correct, using this unfounded amount of loss to enhance petitioner's sentence.

Finally, petitioner suffered further prejudice when the district court again accepted this unfounded amount of loss as true and correct when issuing a restitution order. The district court's restitution award holds petitioner liable for losses that she did not cause. In fact, in making its restitution determination, the district court compounded its error of determining loss for guideline purposes as discussed in section

IV, above. The Court simply took some speculative value of loss, but never referred to a single piece of evidence that calculated the actual total amount of loss AFLAC suffered as a result of the fraudulent scheme. Nothing in the record established petitioner's alleged fraudulent conduct caused the total amount of loss claimed by the government and represented in Exhibit 1. More importantly, nothing in the record proved the actual amount of loss suffered by AFLAC. The government never attempted to prove the actual total loss. Instead, the government speculated that, since petitioner engaged in some fraudulent conduct, each and every claim contained in Exhibit 1 was the result of that conduct. However, restitution can only be awarded for actual losses that were directly and proximately caused by a defendant's criminal activity. *See United States v. Meksian,* 170 F.3d 1260, 1262 (9th Cir. 1999); *United States v. Catherine,* 55 F.3d 1462, 1464 (9th Cir. 1995); 18 U.S.C. §3663A(a)(2). Notably, it is the government's burden to prove that every dollar of the restitution is warranted. *United States v. Follet,* 269 F.3d 996, 1002 (9th Cir. 2001). Here, as previously discussed the government assumed the total amount

indicated on Exhibit 1 represented the total amount of *actual* loss suffered by AFLAC. Yet, it offered no testimony or other documentary evidence to prove the truth of this assumption. The district court thus erred by adopting this speculative loss amount in its restitution order. The Ninth Circuit then erred by upholding that amount.

B. The Evidence was insufficient to support the witness tampering convictions.

The evidence in this case was insufficient to support the conviction for witness tampering pursuant to 18 U.S.C. 1512, subdivision (b)(3). Significantly, the evidence failed to establish petitioner "corruptly persuaded" either Williams or Bennet to lie to law enforcement.

This Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005), squarely addressed the issue of corrupt persuasion in § 1512. This Court observed "[T]he act underlying [a] conviction [for § 1512]—'persuasion'—is by itself innocuous. Indeed, 'persuad[ing]' a person 'with intent to ... cause' that person to 'withhold' testimony or

documents from a Government proceeding or Government official is not inherently malign." *Arthur Andersen*, 544 U.S. at 703–04. Accordingly, a conviction under § 1512 requires evidence that a "persuader [was] conscious of their wrongdoing" such that they "knowingly ... corruptly persuad[ed]." *Id.* at 705–06. No such evidence exists here. As this Court recognized, mere persuasion is not enough to support such a conviction. Here, the record is devoid of anything more than mere persuasion.

For instance, during the trial, the government played telephone calls between petitioner and Williams for the jury and provided the jury with transcripts of these calls in an attempt to count 10, witness tampering against Williams. Exhibits 51 and 52. These conversations speak for themselves. They failed to establish any attempt by Petitioner to *persuade* Williams to lie to the FBI. In fact, during the trial neither Williams never testified to any unjustifiable apprehension in cooperating with the FBI experience *as a result of* conversations with petitioner. She never testified she felt pressured to lie. Petitioner is not heard on telephone calls pleading with Williams to lie or coaxing

Williams to lie. Rather, the evidence established petitioner answered William's questions and addressed her concerns *after* Williams informed Petitioner of her intention to give false information to the FBI.

Here, Williams asked petitioner what to say so the two could "be on the same page." The recorded conversations between Williams and Petitioner establish Williams contacted petitioner with false information, knowing the information was not true. Williams advised petitioner she intended to tell the false story to the FBI. She then asked petitioner to provide further details about the story. Williams was asking petitioner for the information at the direction of the FBI. Williams was told, by the FBI, to seek out information about the alleged fraud from petitioner. This is not a case of witness tampering. Rather it is a situation in which Petitioner went along with Williams' stated desire to tell a false story, providing Williams with information to corroborate that false story. Williams initiated the contact indicating she knew the story was false. Petitioner did nothing to persuade her to tell the false story to the FBI.

For example, in the recorded conversations relied upon by the government when attempting to prove count 10, witness tampering against Williams, Williams expresses that she did not want to cooperate with law enforcement. Williams wanted nothing to do with the investigation. "I don't want to be involved in it. I just don't wanna." (ER Vol. 9, pg. 1759). Those are Williams exact words. She doesn't want to be involved. Petitioner was not persuading her to say anything to the FBI. In fact, petitioner asks Williams "what is your preference on handling this situation? Just tell me what you prefer." (ER Vol. 9, pg. 1758). Those are not persuasive words.

Williams responded to petitioner, stating "I don't have anything to say." (ER Vol. 9, pg. 1758). She immediately follows that with "I need to get the paperwork from you, so I'll know what to say." (ER Vol. 9, pg. 1758). Again, this is not petitioner persuading Williams. This is Williams seeking out information to fulfill her wishes. Williams asked for the information. Petitioner did not tell her what to do. Petitioner did not knowingly persuade her to lie. Rather Williams asked for help in what to do. (ER Vol. 9, pg. 1758).

Here, the government failed to establish that petitioner did anything to intimidate, threaten *or* corruptly persuade Williams into making any false or misleading statements. Anything Williams did she did of her own volition. Williams was not coaxed. Nor did petitioner plead with her. Nor did Petitioner appeal to her feelings or attempt to induce her to lie. Williams told petitioner she was going to lie. Petitioner was not involved in that decision. Based on the evidence presented and the law, there was no witness tampering.

Further, in later conversation petitioner told Williams "don't answer nothing that you can't really answer." (ER Vol. 9, pg. 1763). Petitioner told Williams not to lie, explaining that Williams did not want to be "liable for lying about anything." *Ibid.*

Yet again, notably at the direction of the FBI, Williams asked petitioner what she should say. It was Williams who advised Petitioner she wanted to "be on the same page." (ER Vol. 9, pg. 1764). Williams conveyed her intention to provide a false story to the FBI and continuously asked petitioner how to answer law enforcement questions. Petitioner said that she would handle any case they bring

against her. She did not ask for Williams to help. Rather, at the direction of the FBI, Williams asked Petitioner what to say to keep her (Williams') family safe. (ER Vol. 9, pg. 1765). Williams' request of petitioner for petitioner to corroborate the false information should not be confused with petitioner actively and knowingly *persuading* Williams to lie. Since this imparts a duty on Petitioner to actively tell Williams to tell the truth. Petitioner had no such legal duty. Petitioner did not call up Williams and ask Williams to lie. Instead, Williams called Petitioner, indicated she was going to give a false story, and asked petitioner for the information that corroborated this false story. Petitioner answered Williams' questions. Petitioner never actively and knowingly sought out to persuade Williams to lie. Rather, the evidence established Williams contacted petitioner to advise Petitioner she already decided to not be truthful. Simply put, the evidence was insufficient to support the conviction for witness tampering against Williams as alleged in count 10.

In addition, the government failed to prove beyond a reasonable doubt that petitioner engaged in witness tampering against Bennett, as

alleged in count 11. The evidence presented by the government in regard to this count was scant. In fact, the only evidence offered to support this conviction was a brief colloquy with Bennett in which he testified that, prior to the FBI contacting him, petitioner told him not to talk to law enforcement. (ER Vol. 4, 537-538). Bennett admitted he was not truthful when initially interviewed by the FBI. (ER Vol. 4, pg. 537). He never stated he lied because of petitioner's influence, persuasion, coaxing, or pleading.

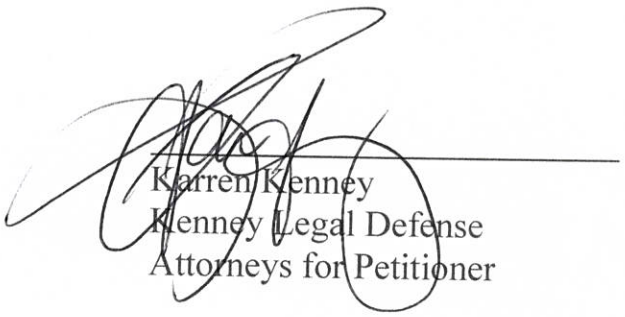
The government established petitioner had multiple conversations with both Williams and Bennett regarding the FBI's investigation into the alleged fraudulent scheme. There is nothing criminal about discussing an FBI investigation with a witness. There is nothing criminal about asking a witness to exercise his or her right to remain silent. See *U.S. v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011). Here, based on the foregoing, no rational juror could conclude from these conversations that either Williams or Bennet were *corruptly persuaded* to lie to the FBI.

In light of the above, petitioner urges that this writ should be allowed so that this Court can decide the very important question of law regarding the foundational requirements for a summary exhibit pursuant to Rule 1006 and the mental state required for witness tampering under a theory of corrupt persuasion.

For all of the above reasons, petitioner respectfully requests the writ be allowed.

Dated: 6.3.19

Respectfully submitted,



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